

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANIS STACY, : CIVIL ACTION NO. 10-4693
Plaintiff :
v :
LSI CORPORATION, et al, : Philadelphia, Pennsylvania
Defendant : May 2, 2011
: 3:07 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(The following was heard in open court at
3:07 p.m.)

THE COURT: Defendant's motion to dismiss.
Why don't we hear from the defendant, and then we'll
hear from plaintiff and then we'll hear from the
Pennsylvania Human Relations Commission.

MR. CAMERON: May I approach, Your Honor?

THE COURT: Please.

MR. CAMERON: Thank you very much.

(Pause in proceedings.)

MR. CAMERON: Your Honor, Bob Cameron here on
behalf of LSI Corporation and Agere Systems, and our
motion to dismiss and for summary judgment is currently
before you.

Under the motion to dismiss, we believe that
our argument is clear, succinct, and short and to the
point. And that is that the Pennsylvania Human
Relations Act does not recognize gender identity as a
covered handicap or disability.

We believe that that position has been
reviewed by two courts, one prior Eastern District
Court opinion in the Dobre case cited in our brief, as
well as the commonwealth court opinion of the
Pennsylvania Commonwealth Court, in which case both
courts found that gender identity disorder or

1 transsexualism is not covered, simply not covered by
2 the act.

3 In support of their arguments, a couple
4 things come to mind. First, the Pennsylvania Human
5 Relations Act was, and I don't think there's any
6 dispute under the participants here today, was
7 patterned after the Federal Rehabilitation Act, and its
8 definition of "handicap" and "disability" is almost
9 identical to the old Federal Rehab Act definition.

10 When the Americans With Disabilities Act was
11 passed the Federal Rehab Act was amended shortly
12 thereafter. Both statutes recognized an express
13 exclusion for, among other things, transsexualism,
14 gender identity disorder.

15 One of the authorities that we have cited in
16 our brief, Your Honor, recognize that that amendment to
17 the Federal Rehab Act, in which the Pennsylvania Human
18 Relations Act was patterned, was based on the original
19 intent, which was that transsexualism and gender
20 identity disorder was not intended to be covered by the
21 act.

22 So, consequently, we believe that since the
23 Pennsylvania Human Relations Act was patterned after
24 the Federal Rehab Act. The federal legislatures made
25 clear that transsexualism and gender identity disorder

1 was never intended to be covered by Rehab Act, that,
2 consequently, it's not covered in this case as well.

3 The Eastern District of Pennsylvania in the
4 Dobre case in 1993 squarely addressed this issue held
5 the same way.

6 THE COURT: Well, didn't it say in Dobre that
7 plaintiff did not allege in the complaint that she
8 suffers from any organic disorder of the body, did not
9 allege that her major life activities were impaired
10 and, therefore, could not sustain a claim for either
11 physical or mental disability?

12 MR. CAMERON: They did, Your Honor. They
13 also said in that case recognizing that the
14 Pennsylvania Human Relations Act is patterned after the
15 Rehab Act, and since the Rehab Act was never intended
16 to cover transsexualism or gender identity disorder as
17 a disability that, therefore, it's not covered. It's
18 not part of the Act, not entitled to the protection.

19 So that's my interpretation of the Dobre
20 case. That's our client's interpretation of the Dobre
21 case. Similarly, the Holt case in 1997 when the
22 commonwealth court addressed that issue, and Dobre was
23 a motion to dismiss case, Holt was preliminary
24 objections also, you know, not enough in complaint to
25 establish a claim.

1 THE COURT: Well, that's what he says in
2 Holt, plaintiff does not allege that transsexualism
3 affects any bodily function or limits her major life
4 activities. Doesn't that mean that this is an
5 insufficient pleading?

6 MR. CAMERON: Well, I do think that there is
7 part of that in the Holt case just as there's part of
8 that in the Dobre case. But I also believe that both
9 cases stand on the proposition that the legislature
10 never intended for transsexualism, gender identity
11 disorder, to be covered. Okay.

12 THE COURT: Well, aren't you putting sort of
13 the rabbit in the hat? I think the question isn't,
14 perhaps, not what you call it, but the question is does
15 it meet the definition of handicap or disability?

16 That is, has the plaintiff alleged a physical
17 or mental impairment, A, and B, which substantially
18 limits one or more major life activities? If the
19 answer to those questions is yes, then you have a
20 handicap or disability.

21 Now, you can call it whatever you want to
22 call it, but your approach is different. Your approach
23 is no matter what the answer to this question is, if
24 you call it a certain thing, then it's not cognizable
25 under the Pennsylvania Statute.

1 MR. CAMERON: That is --

2 THE COURT: And no matter what --

3 MR. CAMERON: That is how --

4 THE COURT: No matter whether or not they
5 meet the definition of "handicap" or "disability."

6 MR. CAMERON: Correct, that's how we
7 interpret the Pennsylvania Human Relations Act
8 patterned after the Federal Rehabilitation Act.

9 THE COURT: Now, tell me again the sequence
10 of events. You said patterned after.

11 MR. CAMERON: Yes.

12 THE COURT: What came first? The
13 Rehabilitation Act?

14 MR. CAMERON: The Rehabilitation Act came
15 first, then the Pennsylvania Human Relations Act
16 adopted handicap or disability as a covered, protected
17 characteristic.

18 THE COURT: Right.

19 MR. CAMERON: Then when the Pennsylvania
20 Human Relations Act first accepted that handicap or
21 disability would be covered they didn't define
22 "handicap" or "disability."

23 The Pennsylvania Human Relations Commission,
24 through its regulations, then gave a definition that
25 was also analogous, almost identical to the Federal

1 Rehab Act's definition of "handicap" or "disability."

2 Then, in 1990, the Americans With
3 Disabilities Act is passed, and that has an express
4 exclusion for transsexualism, gender identity disorder,
5 and other express exclusions not covered by the ADA.

6 And after that, the Federal Rehab Act is
7 amended to reflect that they never intended to cover
8 those classifications that were expressly excluded by
9 the ADA. That happens in '91 or '92.

10 THE COURT: If the amendment came after the
11 adoption in Pennsylvania of the Rehabilitation Act, it
12 could be said that the pennsylvania enactment adopted
13 something that hadn't yet been adopted by Congress.

14 MR. CAMERON: Oh, I understand. I'm not
15 going to say this is a clear cut one way or another.

16 THE COURT: Okay.

17 MR. CAMERON: I don't think either side is
18 completely right or either side is completely wrong
19 here. I think what happened was the Pennsylvania Human
20 Relations Act and the Pennsylvania legislature adopted
21 the Federal Rehab Act. Nobody really at the time new
22 fully what it was intended to encompass.

23 Then the feds, through the Rehab Act
24 amendment and the ADA made --

25 THE COURT: In '91 or '92?

1 MR. CAMERON: Exactly. '90 and '91

2 THE COURT: Yes.

3 MR. CAMERON: Made clear we never intended,
4 among others, transsexualism and gender identity
5 disorder to be covered. After that the '93 case was
6 the Dobre case, the first case interpreting under
7 Pennsylvania law whether or not transsexualism, gender
8 identity disorder is covered by the act. Then, in '97,
9 commonwealth court says it's also not covered.

10 At that point in time, it would be our
11 position if those decisions are wrong, and we recognize
12 they're not binding authority on this Court, but
13 they're certainly persuasive. They're the only two
14 Pennsylvania courts addressing this statute.

15 Then at that point in time either the
16 legislature needs to act, Pennsylvania Human Relations
17 Commission needs to act through a rule making or
18 clarification or something. There's been no change to
19 those interpretations since the Rehab Act was amended,
20 the ADA was enacted, and then the two decisions.

21 THE COURT: What about the Pennsylvania
22 Supreme Court's decision I think it's in Civil Service
23 Commission case, and --

24 MR. CAMERON: Right.

25 THE COURT: -- the methodology that it used

1 to answer these questions?

2 MR. CAMERON: Yeah, and, again, in that case
3 they found that obesity was not a covered disability.
4 Now, the Supreme Court was presented with, because they
5 already had before them, a prior evidentiary hearing
6 before the Human Relations Commission and then before
7 the trial court and an appellate court. They already
8 had a record, so they did not squarely decide one way
9 or another whether, per se, obesity is covered or it's
10 not covered.

11 THE COURT: Yes.

12 MR. CAMERON: They said based on the record
13 we have, plain --

14 THE COURT: Yes, they in a sense --

15 MR. CAMERON: -- plaintiff has established.--

16 THE COURT: Well, my point is does that
17 suggest perhaps a methodology as to how you answer a
18 plaintiff who claims an impairment, and rather than
19 have a list of impairments, what you do is you
20 factually determine whether or not, as I indicated
21 under the statute, depending on the circumstances of
22 that case, whether or not there's a physical or mental
23 impairment. There's none here.

24 MR. CAMERON: Right.

25 THE COURT: And number two, does it limit one

1 or more major life functions? If it doesn't, then I
2 don't care what you call it, then you don't have a
3 disability. If you fit into those categories, you have
4 a disability.

5 MR. CAMERON: Right. And that's a great
6 question that, unfortunately, we don't have an answer
7 to because --

8 THE COURT: Okay.

9 MR. CAMERON: -- they weren't presented with
10 the square issue of is obesity covered or isn't it
11 covered.

12 THE COURT: Right. Right.

13 MR. CAMERON: They already had a full record,
14 and, you know, they weren't reviewing it de novo. They
15 were just looking at the record and seeing if it was
16 there.

17 THE COURT: What did the courts do below
18 there as the case worked its way through the Supreme
19 Court? Was there a trial on the Civil Service
20 Commission?

21 MR. CAMERON: Well, if my recollection is
22 correct, and I have the case back there, but not off
23 the top of my head, there was a Human Relations
24 Commission determination that he was covered by the Act
25 and there had been discrimination.

1 THE COURT: Right.

2 MR. CAMERON: And I believe it was that way
3 all the way up until the Supreme Court overturned the
4 decision.

5 THE COURT: Now, from the Human Relations
6 Commission do you go to the court of common pleas of
7 that county?

8 MR. CAMERON: Yes.

9 THE COURT: Yes, okay.

10 MR. CAMERON: Yes.

11 THE COURT: And then you go to the
12 commonwealth court?

13 MR. CAMERON: Correct.

14 THE COURT: Okay. Very good.

15 MR. CAMERON: So that --

16 THE COURT: Okay. Well, thank you.

17 MR. CAMERON: That --

18 THE COURT: Unless you have something else,
19 let me just hear what their --

20 MR. CAMERON: Well, I wanted to also address
21 I mean --

22 THE COURT: Oh, the Allentown situation.

23 MR. CAMERON: Exactly. Yes, and, you know,
24 two things on this. First, on the local ordinance
25 coverage --

1 THE COURT: Yes, does that add anything to
2 it? I mean is it possible that you could have violated
3 one and not the other?

4 MR. CAMERON: Well, I think that the scheme
5 is the same. I mean I think that the McDonald Douglas
6 burden shifting scheme applies.

7 THE COURT: Right.

8 MR. CAMERON: The real issue is whether you
9 have an additional protection, and I think under the --

10 THE COURT: Like what?

11 MR. CAMERON: Well, under the Allentown Human
12 Rights Act --

13 THE COURT: Right.

14 MR. CAMERON: -- gender identity is already a
15 protected classification, okay?

16 THE COURT: Above and beyond whatever the
17 statute --

18 MR. CAMERON: Above and --

19 THE COURT: -- the state statute says.

20 MR. CAMERON: Unlike in the Pennsylvania
21 Human Relations Act, it is expressly set forth in the
22 local code.

23 THE COURT: Do they have authority to do
24 that?

25 MR. CAMERON: They do.

1 THE COURT: Okay.

2 MR. CAMERON: Under their home rule of
3 charter, they do.

4 THE COURT: Okay.

5 MR. CAMERON: Okay? What they don't have the
6 authority to do is extend over into Hanover Township,
7 which is where Ms. Stacy was employed from 2002 through
8 the end of her employment.

9 THE COURT: Okay. So they have authority
10 to -- I mean assuming that we were going to go down a
11 category of -- I mean even if they had authority to do
12 that, they still would have to meet the disability test
13 though.

14 MR. CAMERON: They would. They would. It's
15 really our argument. And a point I want to make is
16 we're not saying that Ms. Stacy does not have some
17 protection under the statute. She does.

18 We're not in any way arguing that she doesn't
19 potentially have a claim if she can establish all the
20 elements for gender discrimination, or under the
21 Allentown statute that she may have a claim for gender
22 discrimination and she may have a claim for gender
23 identity disorder. What we're arguing is --

24 THE COURT: Well, what is the difference
25 between gender discrimination and gender identity

1 disorder? Wouldn't one fit under the other?

2 MR. CAMERON: Well, I mean probably under the
3 Third Circuit's decision in the Wise Business Forms
4 case from a couple years ago, one of Ms. Eyer's cases,
5 you could probably read them together.

6 I mean in that case, the Third Circuit made
7 clear that discrimination against somebody based on,
8 you know, sexual orientation or gender identity is
9 prohibited gender discrimination. But Allentown has
10 that additional --

11 THE COURT: That was a decision on
12 interpreting what statute?

13 MR. CAMERON: That was interpreting Title
14 VII.

15 THE COURT: Okay.

16 MR. CAMERON: Right, not the ADA. Right.

17 THE COURT: So the issue in Allentown is
18 what?

19 MR. CAMERON: We have two issues in
20 Allentown. First, we're arguing that Ms. Stacy already
21 is covered under, you know, the prohibition against sex
22 discrimination and against gender identity
23 discrimination.

24 But we make the same argument we make before
25 the Pennsylvania Human Relations Act argument, that

1 transsexualism, gender identity disorder, is not a
2 covered disability under the Allentown Human Rights Act
3 either, and as further support for that, Allentown put
4 the express protection in there for gender identity
5 discrimination.

6 THE COURT: But in terms of this geography
7 situation --

8 MR. CAMERON: Right.

9 THE COURT: -- what is the issue there?

10 MR. CAMERON: Well, the issue I guess is
11 where was she employed because --

12 THE COURT: There are two locations.

13 MR. CAMERON: Right.

14 THE COURT: One in Allentown at American
15 Parkway and the other one at Union Boulevard.

16 MR. CAMERON: Right. And from the middle of
17 2002 through the end of her employment, 2008, Ms. Stacy
18 was employed in Hanover Township --

19 THE COURT: And she was --

20 MR. CAMERON: -- not in Allentown.

21 THE COURT: -- in neither one of these
22 locations?

23 MR. CAMERON: She was employed at the
24 American Parkway location, which is located in Hanover
25 Township, which is next to Allentown, but it is not

1 Allentown.

2 THE COURT: Well, it seems --

3 MR. CAMERON: It's a separate --

4 THE COURT: It seems to have an address in
5 Allentown. I don't know what that means.

6 MR. CAMERON: It's the post office. They
7 share a post office.

8 THE COURT: 1110 Parkway Northeast Allentown,
9 PA 18109 is within the --

10 MR. CAMERON: That's within Hanover Township,
11 Pennsylvania.

12 THE COURT: Hanover Township.

13 MR. CAMERON: Correct.

14 THE COURT: Okay.

15 MR. CAMERON: And I recognize that
16 plaintiff's counsel has asked through their response to
17 take some discovery on this production of deed or
18 whatever. If we need to go down that road, we're happy
19 to provide that evidence to them.

20 THE COURT: So if she worked at both places,
21 what would be the answer to that?

22 MR. CAMERON: We believe the answer is where
23 she is primarily employed, Your Honor, and she had been
24 primarily employed since the middle of --

25 THE COURT: You mean in terms of time, you

1 tried to count out the days using one location as
2 opposed to the other?

3 MR. CAMERON: She was overwhelmingly more
4 employed at the Hanover Township location.

5 THE COURT: What type of work did she do, by
6 the way?

7 MR. CAMERON: Excuse me?

8 THE COURT: What type of work did she do?

9 MR. CAMERON: I'm not sure what her specific
10 job was, but it would have been something related to
11 their business, which is semi-conductor manufacturing.

12 THE COURT: Okay. Okay, very good.

13 MR. CAMERON: Thank you.

14 THE COURT: Let me hear from plaintiff's
15 counsel and we'll give you a chance to reply again.

16 MR. CAMERON: Thank you very much.

17 (Pause in proceedings.)

18 MS. EYER: Good afternoon, Your Honor. My
19 name is Katie Eyer and I represent the plaintiff, Janis
20 Stacy.

21 THE COURT: Yes.

22 MS. EYER: I would like to begin by
23 addressing the defendant's motion to dismiss Ms.
24 Stacy's disability discrimination claims.

25 As Mr. Cameron stated in his argument, the

1 crux of the defendant's motion to dismiss is that this
2 Court should carve out a categorical exclusion for
3 gender identity disorders from the plain language of
4 the Pennsylvania Human Relations Act. This approach is
5 impermissible for three independent reasons.

6 First, it contradicts the plain language of
7 the act. Second, it is contrary to the reasoned views
8 of the Pennsylvania Human Relations Commission, which
9 would be afforded deference by the state courts and are
10 entitled to deference from this Court. And, finally,
11 it is contrary to the legislative history of the act
12 and standard canons of statutory construction.

13 I'd like to start with that last point
14 because that was one on which Mr. Cameron spent quite a
15 bit of time. The relevant history here is, as Mr.
16 Cameron stated, that the Federal Rehabilitation Act was
17 enacted with the three part definition of "disability,"
18 which is substantially identical to the definition of
19 "disability" that Pennsylvania has here today. That
20 definition was consistently construed as including
21 gender identity disorders.

22 In 1990, at the time that the ADA was being
23 debated, an express exclusion was added both to the ADA
24 and to the Federal Rehabilitation Act, and very shortly
25 thereafter, the Pennsylvania legislature for the very

1 first time adopted a statutory definition of
2 "disability" for the Pennsylvania Human Relations Act.

3 In adopting a definition, they included some
4 of the exclusions that exist under federal law. So,
5 for example, the exclusion for illegal drug abuse has
6 been incorporated in the Pennsylvania definition of
7 "disability." That is not considered a disability
8 under state law, just as it is not under federal law.

9 But they specifically did not include the
10 pertinent language on gender identity disorders. So I
11 think that this is very powerful indication that the
12 legislature did not intend a categorical exclusion.
13 They certainly --

14 THE COURT: But do you have to show it
15 substantially limits one or more major life activities?

16 MS. EYER: Certainly as to the first prong of
17 the definition of "disability," we would have to
18 demonstrate that. We have pled in our complaint that
19 Ms. Stacy was substantially limited in several major
20 life activities.

21 And, as Your Honor averted to, this is a
22 significant difference between the two cases that the
23 defendant has cited on this matter, Dobre and Holt,
24 versus this case. In both of those cases, the
25 plaintiff there had not pled a substantial limitation

1 of a major life activity.

2 I believe in the Holt case, they also have
3 not plead physical or mental impairment. Whereas,
4 here, Ms. Stacy has fully pled all of the required
5 elements of a disability claim. And it is only by
6 arguing that an exclusion should be read into the law
7 that one could grant a motion to dismiss.

8 THE COURT: Well, I'll go back to the point
9 that I raised with Mr. Cameron, whether the question
10 that the Court has to afford is not whether gender
11 identity is a covered disability, but whether or not
12 the plaintiff has alleged a physical or mental
13 impairment which substantially limits one or more life
14 activities and a record of having such an impairment.

15 Now, what you call it is not, at least at
16 this point, important. There's no list of categories
17 one way or the other.

18 MS. EYER: That's absolutely --

19 THE COURT: I mean you can call it something
20 else. I don't know. But if this is a term that is --
21 that is recognized in the literature as a -- I think
22 there was a citation to the Deanforth (ph).

23 MS. EYER: That's absolutely correct, Your
24 Honor.

25 THE COURT: Yes.

1 MS. EYER: And I would say that we absolutely
2 agree. Our position is precisely that Ms. Stacy'
3 disability must be considered on a case by case basis
4 under the language of the "disability" definition. And
5 that is precisely our argument here today, that she
6 can't be excluded simply because of her disorder.

7 THE COURT: Well, under Civil Service
8 Commission, you could have a case where a person who
9 has been maybe diagnosed as obese would be able to show
10 physical or mental impairment which substantially
11 limited one or more major activities and had a record
12 of such impairment, and that would be recognized as a
13 disability.

14 MS. EYER: That's correct. And if you take a
15 look at the Civil Service Commission decision, they
16 specifically reserve that issue in a footnote. They
17 say we're deciding that on the evidence here there was
18 not adequate evidence to make out a statutory
19 disability, but we reserve the issue of whether obesity
20 may form a disability on other facts and circumstances.

21 THE COURT: Yes.

22 MS. EYER: And this is the standard approach
23 that is applied under the State Disability
24 Discrimination Law to address each case on its facts
25 and circumstances to see whether or not an actionable

1 disability exists.

2 THE COURT: How about the Allentown
3 situation? What do we do about that?

4 MS. EYER: In terms of the motion for summary
5 judgment?

6 THE COURT: Yes.

7 MS. EYER: Yes.

8 THE COURT: Well, yes, I guess what is the
9 factual dispute here?

10 MS. EYER: The factual dispute here is as
11 to -- there's both a factual dispute and a legal
12 dispute. The factual dispute is as to the location of
13 the 1110 American Parkway Northeast facility.

14 We've submitted evidence in connection with
15 our brief that we believe raises a genuine issue of
16 fact as to whether it is located within Allentown,
17 including, for example, the county maps that show that
18 the entirety of the American Parkway never enters
19 Hanover Township. It is exclusively within Allentown.

20 We also believe that this would be an
21 appropriate case for Rule 56(d), formerly Rule 56(f)
22 ruling, given that we have not had the opportunity to
23 conduct discovery.

24 For example, we found online a deed that we
25 believe to be the deed to the property that shows that

1 it falls partially within Allentown, but we have been
2 unable to authenticate that because we have not had the
3 opportunity yet for discovery.

4 So on either of those bases --

5 THE COURT: Did you file an affidavit, by the
6 way, on --

7 MS. EYER: I did file an affidavit.

8 THE COURT: -- 56(f) --

9 MS. EYER: Yes.

10 THE COURT: -- asking for this information?

11 MS. EYER: I did. It's attached to our
12 principal brief.

13 THE COURT: Okay. Go ahead.

14 MS. EYER: Finally, as to the legal dispute,
15 you know, Ms. Stacy did work part-time at what nobody
16 disputes is an Allentown address. That's the 555 Union
17 Boulevard address, and she also applied for positions
18 there at the time of her termination. Both of those
19 are contacts that courts have routinely found to be
20 sufficient to confer --

21 THE COURT: Well, let's assume that the
22 Hanover Township situation is resolved in your favor.
23 Ultimately, if there is liability here, does it make
24 any difference as to whether it is under the Allentown
25 Human Relations statute or the state statute?

1 MS. EYER: As Mr. Cameron adverted to, there
2 is one additional protected class under Allentown law,
3 and that is gender identity is covered separately, not
4 as a -- it's covered both as a disability under
5 Allentown law but then also as a separate
6 classification.

7 At this point, we're pre-discovery, so, you
8 know, I think we have a good faith basis for believing
9 that there are multiple potential bases for the claim
10 here.

11 THE COURT: What would that be if it's a
12 separate qualif -- I mean I guess we've disposed pretty
13 well of the state claim, but explain to me then how you
14 would analyze the case, assuming that it is covered by
15 the --

16 MS. EYER: Allentown law.

17 THE COURT: -- Allentown law.

18 MS. EYER: Just let me get the language of
19 the Allentown law.

20 THE COURT: Yes.

21 MS. EYER: So Allentown law, in addition to
22 covering sex and disability, which plaintiff has claims
23 under, also has a separate class for gender identity,
24 which is defined in the act as "Self-perception or
25 perception by others as male or female, including a

1 person's appearance, behavior, or physical
2 characteristics that may be in accord with or opposed
3 to one's physical anatomy, chromosomal sex, or sex
4 assigned at birth."

5 So it has a somewhat different definition.
6 So, for example, there's a possibility that a jury
7 might conclude that Ms. Stacy does not meet the
8 definition of disability, but that she does fall within
9 this gender identity definition. So that's what's the
10 difference in proceeding under Allentown law as opposed
11 to under the state law.

12 THE COURT: And what would she be entitled to
13 by way of damages under the Allentown statute?

14 MS. EYER: I believe the remedies under the
15 Allentown law are the same as under state law.

16 THE COURT: It should be compensatory and
17 punitive damages?

18 MS. EYER: There are no punitive damages
19 permitted under state law, and I believe that the same
20 is true under Allentown law, though I'm not sure off
21 the top of my head.

22 THE COURT: Okay.

23 MS. EYER: Your Honor mentioned the issue of
24 whether Allentown had the authority to enact this law.

25 THE COURT: Right.

1 MS. EYER: There's actually one of the cases
2 cited in the brief, Hartman versus City of Allentown
3 resolved that very issue in the affirmative saying that
4 localities can enact these types of laws, they can
5 include classes that are not addressed under state
6 law.

7 THE COURT: That's a Pennsylvania Supreme
8 Court decision?

9 MS. EYER: It's a commonwealth court decision
10 but based on a Supreme Court ruling in another case
11 that's actually cited in the briefs.

12 THE COURT: Under the local rule --

13 MS. EYER: Their home rule authority --

14 THE COURT: Home rule authority.

15 MS. EYER: -- under the police power gives
16 them the authority to enact these types of laws.

17 And a final point that I just wanted to note
18 in relation to the Hartman decision, in that case, we
19 had precisely the circumstance of the PHRC expressing
20 their view of the Pennsylvania Human Relations Act in
21 an amicus brief.

22 The commonwealth court afforded that view
23 substantial deference, and that is, you know -- the
24 Third Circuit has made clear that the federal courts
25 should do the same where the views of the agency would

1 otherwise be afforded deference under state law.

2 THE COURT: But not as to Allentown Human
3 Relations -- does Allentown has a Human Relations
4 Commission?

5 MS. EYER: It does have a Human Relations
6 Commission.

7 THE COURT: Okay.

8 MS. EYER: We did not ask that they
9 participate as amicus in this case, given that the
10 Allentown issue is much more focused on the location
11 issue, which is a dispute of fact.

12 And I will note the defendant also does make
13 a separate argument in relation to Allentown law that
14 Ms. Stacy can't be covered under both the disability
15 prong and the gender identity prong. That's simply not
16 the case.

17 There are overlapping coverages for numerous
18 classifications under the Allentown law, such as color
19 and race or national origin and place of birth. So
20 there's no reason to believe that the commission
21 intended that claimants could only prove claims under
22 one particular classification.

23 THE COURT: Yes. Okay, very good. Thank
24 you.

25 MS. EYER: Thank you.

1 THE COURT: Human Relations Commission,
2 sitting there by yourself.

3 MR. HANCOCK: It's lonely over here, Your
4 Honor.

5 THE COURT: Okay. You are Mr. Hancock?

6 MR. HANCOCK: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. HANCOCK: My name is Ryan Allen Hancock
9 and I'm representing the Pennsylvania Human Relations
10 Commission today.

11 Your Honor, gender identity disorder is not
12 statutorily or categorically, as a matter of law,
13 excluded from consideration of a disability for three
14 main reasons.

15 THE COURT: Or included.

16 MR. HANCOCK: It is not excluded from
17 consideration as a disability --

18 THE COURT: Right.

19 MR. HANCOCK: -- for three principal reasons.
20 One is that the gender identity is -- gender identity
21 disorder is not specifically or expressly excluded
22 under the plain language of the act.

23 Two, the Pennsylvania general assembly did
24 not intend to exclude gender identity from this
25 coverage.

1 And, three, impairments must be reviewed on a
2 case by case basis in order to determine if that
3 impairment is a disability under the law.

4 For example, a person or an individual
5 alleging gender identity dis -- gender identity
6 disorder, claiming protection under the act, must
7 allege that he or she has been aggrieved by an
8 unlawful, discriminatory practice based upon that
9 alleged disability, and offer factual evidence that his
10 or her impairment meets that three prong statutory
11 definition under the act.

12 And any other statutory interpretation would
13 wholly frustrate the Pennsylvania general assembly's
14 intent to foster the employment of all individuals in
15 their fullest capacities regardless of their protected
16 class.

17 Your Honor, if you review the act as well as
18 the regulations, one will note that gender identity
19 disorder is not expressly excluded under that act. In
20 fact, the only express exclusion with regard to
21 handicap or disability relates to the controlled use or
22 addiction to a controlled substance.

23 So, Your Honor, even if the Pennsylvania
24 Supreme Court would look beyond the plain language,
25 there is no evidence that the general assembly intended

1 to exclude gender identity disorder from coverage.

2 Further, all other textual evidence supports
3 the commission's position that impairments must be
4 reviewed on a case by case basis -- basis in order to
5 determine if that impairment is a disability under the
6 act.

7 Finally, Your Honor, I would have to say --
8 or it is the Commission's position that this Court
9 should, as the Pennsylvania Supreme Court would, give
10 the Commission's interpretation of the act substantial
11 weight in this matter, as we have here today. Thank
12 you.

13 THE COURT: Okay. Very good. Okay. Mr,
14 Cameron, a brief --

15 MR. CAMERON: Just very briefly, Your Honor.

16 THE COURT: -- reply if you wish.

17 MR. CAMERON: Just very briefly. Thank you.

18 My only point is with all due respect to the
19 Pennsylvania Human Relations Commission, there have
20 been two interpretations of the statute, one by the
21 Eastern District of Pennsylvania, one by the
22 Commonwealth Court of Pennsylvania, both dating back to
23 1993 and 1997.

24 If those cases were decided wrongly, if those
25 cases were decided incorrectly, where is the

1 clarification, where are the regulations, where is the
2 guidance? Okay. We may not be here today if we had
3 that.

4 All right. So our position is, again, just
5 to summarize real quickly, the Federal Rehab Act is the
6 applicable authority on which the Pennsylvania
7 legislature adopted the Pennsylvania Human Relations
8 Act.

9 The Federal Rehab Act was amended to make
10 clear that it was never intended to cover
11 transsexualism and gender identity disorder for the
12 same reason the Pennsylvania Human Relations Act should
13 be interpreted the same way as it has in two prior
14 decisions that are non-binding, but precedential -- or
15 I'm sorry -- but persuasive. Thank you, Your Honor.

16 THE COURT: Okay. Thank you. Well, I
17 think everything has been said, even if it hasn't been
18 said by everybody. But I think it's been a very
19 engaging and well-prepared. I commend counsel. You've
20 been very, very helpful.

21 But I think I'm ready to rule in this matter.
22 And let me first address the motion to dismiss the
23 gender identity disorder under the Pennsylvania Human
24 Relations Act.

25 As to the methodology, I'm going to rely upon

1 the decision of the Pennsylvania Supreme Court and
2 Civil Service Commission where the Pennsylvania Supreme
3 Court found that the plaintiff had not alleged a prima
4 facia claim for disability based on obesity.

5 It did so, however, after considering at
6 length the facts of that case, including the weight and
7 life activities which the plaintiff in that case had
8 engaged in.

9 After a thorough review of the record, the
10 Supreme Court found that in that case the plaintiff
11 had not prevailed showing that obesity was a
12 disability.

13 With that framework in mind, I turn to the
14 allegations that have been made in this complaint. And
15 I find that looking at the definition of "handicap" or
16 "disability" in the Pennsylvania Human Relations Act,
17 the plaintiff has sufficiently alleged a physical or
18 mental impairment which substantially limits one or
19 more major life activities, and a record of having such
20 impairment. That being so, the allegations in the
21 complaint appear to satisfy the definition under the
22 Pennsylvania Human Relations Act.

23 I will distinguish both the interpretations
24 that counsel relies on in Dobre versus Amtrak and the
25 Holt case, a decision by this court, Judge Hutton, in

1 1993, and a decision of the commonwealth court in 1997.

2 Both cases appear to focus on the allegations
3 of the complaint and properly identified that the
4 plaintiff had failed to allege the very requirements of
5 the Pennsylvania Human Relations Act.

6 That is he had failed to allege a physical or
7 mental impairment which substantially limited a major
8 life activity. Therefore, Dobre and Holt are not
9 helpful in this case.

10 Under those circumstances, it just seems to
11 me that what we need to do is to proceed to the
12 relevant record in this case, and based upon that
13 record, we can then contrast the actual record to the
14 definition of the Pennsylvania Human Relations Act and
15 see whether or not on the record and on the facts of
16 this case plaintiff meets the definition of
17 "disability."

18 Given that this is a motion to dismiss, we
19 accept as true the well pleaded allegations of the
20 complaint and we draw all reasonable inferences in
21 favor of the plaintiff. Given the standard to be
22 applied and the allegations of the complaint, the
23 motion to dismiss will be denied.

24 As far as the motion for summary judgment is
25 concerned, I'm going to deny that motion instead of

1 granting the plaintiff an opportunity to simply reply
2 to it.

3 I think the most economical way of doing this
4 is just to allow discovery to proceed. So the motion
5 for summary judgment will be denied without prejudice
6 and it may be reasserted at the completion of discovery
7 once the parties have had an opportunity to address
8 with specificity, the question that has burdened the
9 legal world for years, whether 1110 American Parkway is
10 in Allentown or in the Township of Hanover.

11 So I will let you try to figure that one out
12 and come back to me. So I think what we need to do is
13 setup a reasonable period of time to do discovery on
14 both of these matters. Ms. Eyre, what do you have in
15 mind?

16 MS. EYER: We did not confer with the
17 defendant yet on the length of discovery. I would
18 imagine standard, you know, six months. I don't know
19 if that --

20 THE COURT: Yes. Did you have a 26(f)
21 conference as to --

22 MR. CAMERON: We haven't yet because of this
23 motion, and --

24 THE COURT: Okay, fine.

25 MR. CAMERON: -- if Your Honor would like, we

1 can consult and get back to you within a week.

2 THE COURT: Okay. Well, why don't I do this?
3 I'll do this on broad strokes now so that we can get
4 started and we can have a hundred and eighty days to
5 take discovery and file motions for summary judgment at
6 that time. So you have a hundred and eighty days to do
7 all this work and be prepared to file motions at that
8 point.

9 What I will do is then set the case for trial
10 thirty days thereafter, which really means that if the
11 motion has not been decided, it will be thirty days, if
12 a trial is warranted after the motion for summary
13 judgment is decided.

14 But for scheduling purposes we would like to
15 set a trial date. And the trial date will be thirty
16 days after the completion of discovery or summary
17 judgment or when summary judgment is decided. So you
18 got to be prepared to do that.

19 Once you meet, I'd like you to submit a 26(f)
20 report and if there is some drastic amendments, I will
21 get you on the phone and we'll discuss them. If they
22 are not much to change and both parties agree, I'll
23 likely to go along with your suggestions, and you know
24 the case best.

25 So, that's where we are. As far as ADR is

1 concerned, the protocol that I followed goes this way.
2 First, the parties should take some discovery so that
3 they are confident that they have a handle on the facts
4 before they sit down to discuss a possible resolution
5 of the case.

6 But probably sixty to ninety days out we
7 could have a conference with the magistrate judge,
8 Magistrate Judge Rueter, to see where you are in the
9 case.

10 My approach is that no one has an obligation
11 to agree to anything, but there is an obligation to at
12 least discuss the matter, and be sure that your clients
13 understand the alternatives available and some
14 preliminary evaluation of where you are.

15 If, at that time, you think you are not yet
16 ready to engage in a settlement conference, that's
17 fine, just let us know. Nobody wants to waste time
18 and, you know, have everybody come here.

19 But my recommendation would be that it's
20 generally helpful to hear what the magistrate judge
21 has to say and to explore each other's position as
22 well.

23 So that's the marching, you know, marching
24 orders in this case. So if there is a discovery issue,
25 the proper way to do that is file a motion. And I will

1 then get you on the telephone and we'll try to sort
2 that out promptly so that it will not delay the
3 progress in the case.

4 So anything else then? Ms. Eyre, anything
5 from you?

6 MS. EYER: No, Your Honor.

7 THE COURT: Mr. Cameron?

8 MR. CAMERON: No, Your Honor.

9 THE COURT: Mr. Hancock, thank you for coming
10 in.

11 MR. HANCOCK: Thank you, Your Honor.

12 THE COURT: Okay. We'll adjourn now. Thank
13 you.

14 (Proceedings adjourned, 3:47 p.m.)

15 * * *

CERTIFICATION

I, Matthew Tilghman, do hereby certify that
the foregoing is a true and correct transcript from the
electronic sound recordings of the proceedings in the
above-captioned matter.

8-9-11
Date

Michael Keating
Michael Keating